STATE OF MICHIGAN

COURT OF APPEALS

JOHN SCHAENDORF and CONNIE SCHAENDORF, Plaintiff-Appellees, v CONSUMERS ENERGY COMPANY, Defendant-Appellant.	UNPUBLISHED March 6, 2007 No. 269661 Allegan Circuit Court LC No. 04-035985-NZ

Before: Fort Hood, P.J., and Smolenski and Murray, JJ.

MURRAY, J., (*concurring in part, dissenting in part*).

I concur in the majority's reasoning and result with respect to its treatment of plaintiffs' nuisance claim, as well as with the majority's conclusion that the discovery rule does not apply to this case.[1] However, I part ways with the majority's conclusion that a genuine issue of

[1] The discovery rule does not apply in this case for the additional reason that the Legislature has not provided for the application of such an extension to the three-year period of limitations within MCL 600.5805(10), nor has it otherwise modified when a claim accrues under MCL 600.5827. This conclusion is compelled by our Supreme Court's decision in *Garg v Macomb County Community Mental Health*, 472 Mich 263; 696 NW2d 646 (2005). The key holding in *Garg* was the Court's decision that the common-law "continuing violations" doctrine was inconsistent with the accrual language of MCL 600.5827 and the straightforward three-year period provided in MCL 600.5805(10). More simply, the Court concluded that under MCL 600.5805(10), "three years' means three years." *Id*. at 284. See, also, *Magee v Daimler Chrysler Corp*, 472 Mich 108, 113; 693 NW2d 166 (2005); *Boyle v General Motors Corp*, 468 Mich 226, 231-232; 661 NW2d 557 (2003). *Garg* and *Magee*, like the instant case, involved application of a common law device to essentially extend the time for bringing suit beyond the three-year period within MCL 600.5805(10). Both Courts refused to do so, most explicitly the *Garg* Court, for the reason that there was no provision allowing it within the statute. The same holds true with respect to the discovery rule, a fact that seems to have been recognized by the Court. See *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 475 Mich 906; 717 NW2d 329 (2006).

material fact exists on whether the statute of limitations bars plaintiffs' negligence claim. I conclude that any claim for damages sought by plaintiffs that accrued prior to June 29, 2001, which are outside the three-year statute of limitations, are barred as a matter of law. I would therefore reverse in part the trial court's order and remand for entry of an order granting in part defendant's motion for summary disposition.

Although I agree with the majority's conclusion that the discovery rule does not apply to this case, in my view plaintiffs are limited to recovery of those damages for claims that arose after June 29, 2001, three years before the complaint was filed. *Garg, supra*. MCL 600.5827 provides that a claim accrues when the wrong is done, and "[t]he wrong is done when the plaintiff is harmed rather than when the defendant acted." *Boyle, supra* at 231, n 5, citing *Stephens v Dixon*, 449 Mich 531, 534-535; 536 NW2d 755 (1995).[2] Here, a portion of the damages plaintiffs are seeking to recover are for losses occurring in 2000 and part of 2001, but the evidence presented by plaintiffs shows that the wrong causing those damages had already occurred before June 29, 2001, that plaintiffs were well aware of this harm,[3] and yet did not file suit until more than three years later. Consequently, damages for the harm caused by defendant's conduct before June 29, 2001, should be time-barred. See *Jackson County Hog Producers v Consumers Power Co.*, 234 Mich App 72, 81-82; 592 NW2d 112 (1999) (holding that the installation of electricity was the tortuous act, while the stray voltage was the resulting harm.).

However, as argued by amicus curiae Michigan Farm Bureau, plaintiffs' entire case is not subject to dismissal because plaintiffs have alleged *new* conduct within the three-year limitations period. In particular, plaintiffs allege that defendant caused stray voltage to enter the farm through the installation of a new line into the "washbarn" in June 2003, and that has caused additional[4] damage to the livestock. Thus, plaintiffs have alleged a separate act that has allegedly caused additional damage to their livestock. That claim is not barred by the statute of limitations. *Garg, supra*; *Jackson Hog Producers, supra* at 81-82; *Grist v UpJohn Co*, 1 Mich

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[2] There are several exceptions to this accrual rule, but they are not applicable to this case. MCL 600.5829-5838.

[3] The undisputed evidence revealed that plaintiffs were well aware that stray voltage could be a problem for livestock farms. Specifically, in the mid-1990's defendant had mailed a stray voltage video to plaintiffs, and plaintiff Connie Schaendorf reviewed the tape. In 1995 plaintiffs filled out a stray voltage checklist sent by defendant, and then had defendant come to their farm to do an inspection. Defendant also gave plaintiffs a voltmeter for their own use. Another inspection occurred in 1997. Additionally, plaintiff John Schaendorf testified that he believed that stray voltage problems first occurred in late 2000, as they were experiencing a decrease in production, and an increase in livestock deaths and ketosis. Plaintiffs' expert Michael Behr concluded that the stray voltage had begun as early as mid-2000, while another expert, Gerald Bodman, testified that stray voltage began to be a problem at the farm in late 1999 or early 2000.

[4] "Additional" as in additional to and separate from the damages caused by the stray voltage that occurred before June 29, 2001, the damages for which plaintiff improperly sought to recover in a lawsuit filed in 2004. See *Connelly v Paul Ruddy's Co.*, 388 Mich 146, 151-152; 200 NW2d 70 (1972).

App 72, 81; 134 NW2d 358 (1965).[5] Therefore, I would reverse the trial court and remand for entry of an order granting in part defendant's motion and limiting plaintiffs to damages for any stray voltage entering through the "washbarn" that caused damage to the livestock.

/s/ Christopher M. Murray

[5] Defendant conceded at oral argument that this allegation is properly considered in this case. Additionally, whether this newly installed line caused any damages is not an issue before this Court.